IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 369 of 1989

with

CRIMINAL APPEAL No 445 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and sd/-
MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 No.

JIVANJI @ VIJANJI C KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 369 of 1989

MS BANNA S DUTTA for Appellant.

Mr.B.D.Desai,Addl.PUBLIC PROSECUTOR, for respondent.

2. Criminal AppealNo 445 of 1989

Mr.B.D.Desai,Addl.PUBLIC PROSECUTOR for appellant.

Ms.Banna Dutta, for respondent.

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

Date of decision: 18/12/97

ORAL JUDGEMENT

One Kurshi Umedji (original complainant) had married with Bai Chanda, daughter of Gobraji Lekhaji Koli of village Chekhala.After said marriage, Jivanji alias Vijanji Chaturji, uncle of Bai Chanda, came to fetch her on 19.6.1987. Said Jivanji then took Bai Chanda on 20.6.1987. Chanda had gone with Jivanji with necessary clothes and number of ornaments referred in the complaint. After Jivanji went with Bai Chanda, father of Chanda came to fetch her after two days and informed Kurshiji that Chanda has till date not reached their village. Thereafter, search for Bai Chanda was made. Thereafter, uncle of Bai Chanda came to Aseda village and declared that dead body of Bai Chanda is lying in the Vehla of river of Bhadramali village. Thereafter, the complaint was lodged on 3.7.1987 and on 4.7.1987, Jivanji was arrested and the offence was registered. On the offence being registered and on completion of investigation, accused was charge-sheeted before the Court of Judicial Magistrate, First Class, Disa, and was committed for trial before the Sessions Court at Palanpur, being Sessions Case No.4/89.

On charge being framed against the accused, accused pleaded not guilty. He was tried and on completion of the evidence by the prosecution and hearing the prosecution and the defence, the learned Addl.Sessions Judge held the accused guilty of the offence under section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life and acquitted him of offence under section 394 of the Indian Penal Code. However, he convicted him for the offence under section 404 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for two years.

Criminal Appeal No.369/89 is an appeal by the accused against his conviction and sentence under section 302 and section 404 of the Indian Penal Code. Criminal Appeal No.445 of 1989 is by the State against the order of acquittal of the offence under section 394 of the Indian Penal Code. As both the appeals arise from the same judgment and order, they are heard together and are disposed of by this common judgment.

Learned Advocate, Ms.Banna Dutta, for the appellant-accused, has challenged the order of conviction on the ground that the order of conviction is bad,

inasmuch as the same is not warranted by any evidence on record. She contended that there is neither any direct evidence to link the accused with commission of offence, nor the circumstances relied on by the prosecution are sufficient to hold accused guilty of the offence charged. She further contended that if the circumstance of accused and the deceased having been seen together last is relied on, then also it does not lead to an inference of commission of murder by the accused. Such a circumstance of having been seen together last can only lead to an inference of kidnapping and not of murder. To support her contention, she has relied on a judgment in the case of Surjit Singh and another v. State of Punjab,reported in AIR 1994 Supreme Court 110. According to her, in the facts of the present case and in view of the judgment in the case of Surjit Singh (supra), accused can at the most be guilty of an offence for receiving stolen property and nothing more.

She also contended that in view of the above arguments, the acquittal-appeal filed by the State also deserves to be dismissed.

Learned Addl. Public Prosecutor, Mr.B.D.Desai, contended that the appeal of the accused is liable to be dismissed and the appeal filed by the State against the order of acquittal under section 394 of the Indian Penal Code is liable to be allowed, inasmuch as at least two articles which belonged to deceased and proved to be so by the prosecution-evidence are found from the possession of accused. If find of these articles is appreciated together with the act of commission of murder by the accused, only fact which will evolve is commission of offence under section 394 of Indian Penal Code and therefore the order passed by the learned Additional Sessions Judge acquitting accused of the said charge is bad in law. Therefore, the accused should be convicted under section 394 of the Indian Penal Code. He also supported the conviction under section 404 of the Indian Penal Code, in the facts and circumstances of the case.

Though the accused has denied to have fetched away Bai Chanda from the house of complainant on 20.6.1987, in our opinion, there is sufficient evidence not only of the complainant Kurshiji, but that of father of Kurshiji, i.e. Umedji, and one Dharmaji to support the same. Kurshiji, P.W.1 has deposed (relevant part):"Chanda stayed at my home for three days and then

Chaturji Jivanji came to fetch my wife. My wife happens to be niece of Jivanji. On the next day of Jivanji having come to fetch my wife, I sent my wife with him. When my wife left with Jivanji, she had put on certain ornaments, namely.....There was gold Dodi and Om (pendent) also worn by her. Om and gold Dodi both were weighing 4 Annas (4 Annas means quarter of a tola).....After my wife left with Jivanji, daughter of Bachu Nava, had come from village Dhuva and she told me that Chanda and Jivan have still not reached Chekhala. Two days thereafter, my father-in-law,Gobarji, had come to my house. He also told me that till date, those persons have not reached. Thereafter Dharmaji Raghuji,Dharsinhji Vashramji, Chhaganji Sendhaji and Sagramji Ranchhodji went in search of accused and Chanda. Search was made at villages Bodal and Chekhala. However, they were not found. Two days thereafter, my uncle-in-law Gambhirji had come to village Aseda and told that Chanda is lying dead in vehla of of river at village Bhadramali. Then, I, Dharmaji Raghuji, went to the vehla of Bhadramali, where skeleton of my wife was lying. Our bag was also lying there. On the basis of bag, chappals, petticoat, blouse,which were worn by deceased Chanda, we identified Bai Chanda. There were no ornaments there on person of Bai Chanda. Thereafter, police complaint was filed.....I am shown article 19 dodi which was worn by my wife when she accompanied accused. This dodi was given to my wife by her father at the time of marriage, and I identify the same. I am shown Article 20, a pendent of Om, which was worn by her on her neck, when she accompanied accused. This pendent was given by us to her at the time of the marriage and it is the same." (We do not refer to other articles, though identified by the complainant and have been seized by the police at the instance of the accused, as we do not propose to rely on that part of evidence). In the cross-examination of this witness, nothing, in our opinion, has been suggested which may entitle us to reject the evidence of this complainant. In the cross-examination, there are suggestions of denial only. Important suggestion, in our opinion, in the cross-examination is that accused denied to have gone to fetch Bai Chanda. Accused has also denied this part of having gone to fetch Chanda, even in his further statement under section 313 of the Code of Criminal Procedure.

However, the evidence to the effect that accused has gone to fetch Chanda also comes independently from the deposition of the father of the complainant, i.e. Umedji, P.W.6, and Dharmaji Raghuji, P.W.2. Umedji is

supposed to be in the house, as stay of complainant with his father is not disputed and presence of Dharmaji Raghuji at the time of Chanda being taken by the accused is natural and normal because that man belongs to the community of the complainant. He was Deputy Sarpanch in the past and according to him, he was on visiting terms with the family of the complainant. Even from the cross-examination of these two witnesses, nothing transpired which may entitle us to reject the evidence of the complainant to the effect that accused fetched Bai Chanda who had put on certain ornaments, in particular dodi and pendenta of Om at the time when she left her husband's house.

Identity of those articles being Articles Nos.19 and 20 belonging to Bai Chanda, one being given by the father of Chanda and other by the in-laws of Chanda, is not disputed by the defence.

Articles Nos.19 and 20 being dodi and pendent of Om are found from the house of the accused, at the instance of the accused. This fact is proved by evidence of Panch, Valabhai Kohjibhai, P.W.14. Panch Valabhai Kohjibhai has deposed that he was called as Panch by the Police on 4.7.1987. Other Panch was one rickshaw-walla. There were police persons and one Parmar Saheb present. One accused was present. His consent was obtained to act as Panch. Accused at that time told that "Sir, come on, I will show ornaments". As accused made this statement, a preliminary panchnama was drawn which bears the thumb-mark of this witness and signature of another Panch. Then, at the say of accused, they went to village Chekhala in a jeep car . Near the house of accused, they got down from the jeep and went towards house of the accused. Accused was ahead and the witness and others were following him. Accused went in his house. On going in the house, he took out two ornaments wrapped in paper, again wrapped in plastic bag from 'Pat' in the house. Those ornaments are one dodi of gold and another is pendent of Om of gold, and they are Articles 19 and 20. In the cross-examination of this Panch witness, a suggestion is denied that because the police harassed him, mother of the accused has brought out these ornaments. The witness has stated that it is not true that accused had not taken out the ornaments. Assuming that what is stated in the cross-examination is true that because the police harassed the accused, his mother took out the ornaments,Articles 19 and 20, then also at no point of time during the trial it is the case of the

accused or the mother of the accused that these Articles 19 and 20 belong to them and they have not disputed that they belonged to deceased Chanda.Panchnama of the seizure of these articles is duly proved at Exh.24. Thus, from the evidence of this Panch witness, Valabhai Kohjibhai, P.W.14, Articles 19 and 20 are produced by the accused and the same belonged to deceased Chanda, as duly proved by the evidence of the complainant and the father of the complainant as well as by Dharmaji Raghuji,P.W.2.

On receipt of the complaint by the police on 3.7.1987, Panchnama of scene of offence was drawn. One of the Panchas, Chamanji Meruji, P.W.22, has proved by his evidence the said Panchnama, Exh.46. By the said Panchnama, clothes, which were found at the scene of offence, are seized. Said clothes, which are seized by Panchnama, Exh.46, are proved to be clothes of deceased Chanda by evidence of P.W.1, P.W.2 and P.W.6. From the scene of offence, bones of the human skeleton are also seized and were sent to the Forensic Science Laboratory.From the evidence of Dr.(Mrs.) Chandraprabha Ashok Pensi, P.W.24, the bones are found to be (1) of human being; (2) of a woman and (3) of a person above 25 years of age. However, cause and time of death could not be ascertained from the same. Suggestion in the cross-examination to the effect that the death might have occurred before six months is denied. However, she has admitted that the death of the person of whom the bones are there, was not an immediate one.Thus, bones of the human skeleton found from the scene of offence are proved to be of a woman aged above 25 years.

From near the scene of offence, bones of human skeleton are found of a woman above 25 years of age. Clothes which belonged to Bai Chanda are found. Bai Chanda is missing, as complained by Kurshiji, her husband, father and father-in-law . The question, therefore, is when it is proved by the evidence on record that Bai Chanda left house of Kurshiji in company of accused and the clothes worn by her are found from near the place from where the bones which belong to a woman aged above 25 years of age are found, the irresistible inference would be that Bai Chanda is killed by the accused. Circumstances, namely,(1) taking away Bai Chanda by the accused, and in particular, without knowledge of the father of Bai Chanda,by making a false statement that he is asked to fetch her by her father; (2) Bai Chanda missing since then; (3) clothes belonging to Bai Chanda, proved to be of Bai Chanda, were found in

a bag which belonged to Bai Chanda, from the scene of offence; (4) bones of human skeleton of a woman above 25 years of age are found from the scene of offence and (5) accused was not traceable since the day he had gone with Bai Chanda, are the circumstances, in our opinion, to lead to an irresistible conclusion that it is the accused who has committed murder of Bai Chanda. There is positive evidence of P.W.1, P.W.2 and P.W.6 to the effect that accused left in company of Bai Chanda from the village of P.W.1, Kurshiji, in a jeep-car for going to the house of the father of Bai Chanda and since then Bai Chanda was missing. Question is from the fact of accused being found in company of Bai Chanda last, as seen by P.W.1, P.W.2 and P.W.6, what inference is to be drawn? If a person is found in company of a person who then is found to have been killed, then that person in whose company the dead person was found last, is required to explain the same. In the instant case, accused has not explained any of the circumstances referred to above. His case is of a blank denial. Therefore, it is left to the court to be drawn.

Learned Advocate for the defence, Ms.Banna Dutta, relying on the judgment in the case of Surjit Singh (supra), has contended that presumption of murder cannot be invoked under section 114 of the Evidence Act. She has relied on paragraph 7 of the judgment, which reads as under:-

"7. From the above stated circumstances, it may be seen that P.W.6's evidence is of great importance in connecting these appellants with the crime. Therefore, we have carefully gone through the evidence of P.w-6. He deposed that he was running a tea shop and on 17-5-79, he had gone to the threatre to see the last show and the show was over by 1 a.m. and he engaged a rickshaw for coming to his house and when he reached the chowk he noticed two accused quarrelling with the deceased and inflicting injuries. He proceeded to state that he did not interfere since the accused were gamblers and that having learnt next day about the death of the deceased, he himself volunteered and went to the police station and gave a statement on his own. The conduct of the witness is highly unnatural. When he has seen one of the appellants inflicting injuries, one would expect him to raise an alarm or at least inform the kith and kin of the deceased so that they can go for the rescue of the victim, which he did not do. From the record, it does

not appear that at least he was examined during the inquest. We do not know when his statement was recorded during the course of the next day. On his own showing, he was involved earlier in some cases. In one case, he was stabbed by the deceased and in another case he himself was the accused for molestation of a woman. Therefore, he is of a questionable character. However, his conduct is highly unnatural. Though we cannot call him entirely a false witness but in the absence of any other corroborating evidence we think it is highly unsafe to accept his evidence and then convict both the appellants. In this regard, the prosecution could have examined the rickshaw puller in which he was travelling, which they have not done. For all these reasons we find it difficult to place any reliance on this witness. If the evidence of this witness is to be eschewed, then, we are left with other circumstances mentioned above. The motive, by itself, is not a circumstance, though it may be relevant in a case of circumstantial evidence. But the prosecution case itself shows that these persons were gamblers and indulged in quarrels and again patching up their hostilities. Then, we are left only with the two circumstances,viz., the accused along with the deceased went to the picture, but that was at 8.30 p.m. The occurrence is said to have taken place at 1.30 a.m. That, by itself, does not connect the appellants with the offence. The last circumstance is the recovery of the watch at the instance of Gurcharan Singh.PW-9 supports the prosecution case and some documents also have been filed. Even assuming these circumstances as established, we cannot connect him with murder by invoking illustrations to Section 114 of Evidence Act. At the most, he can be convicted for being in possession of stolen property. The recovery of dagger again depends upon the Panchnama and Panch witness. In any event, a recovery by itself, does not connect Surjit Singh with murder. Even taking all these circumstances after excluding the evidence of PWs-6 and 7 for consideration, they may create some suspicion but the same cannot take the place of proof. For all the reasons mentioned above, the convictions of both the appellants under Section 302/34, Indian Penal Code are set aside and the Appeal No.626/1984 filed by Surjit Singh is allowed. Since we have accepted the recovery of the watch belonging to the deceased at the instance of Gurcharan Singh an offence under Section 411, Indian Penal Code is made out, accordingly while setting aside his conviction under Section 302/34, Indian Penal Code, we convict him under Section 411, Indian Penal Code and sentence him to undergo Rigorous Imprisonment for two years. Hence Criminal Appeal No.36 of 1983 is partly allowed to the

extent indicated above. The bail bond of Surjit Singh stands cancelled, since an Appeal No.626/84 filed by him is allowed. If Gurcharan Singh, the other appellant in Criminal Appeal No.36 of 1983 has already served out the sentence, he may be released forthwith."

In the case of Surjit Singh (supra), the prosecution has relied on as many as five circumstances referred in paragraph 6 which reads as under:-

"6. The items of evidence relied upon by the prosecution is as follows:-

(1) That there was an earlier quarrel between the accused and the deceased that is stated to be the motive. (2) On the day of occurrence at 8.30 p.m, the accused came and took the deceased on the pretext of seeing a movie, spoken to P.Ws-3 and 4.(3) On the same night at about 1 a.m. PW-6 saw the accused and the deceased quarrelling somewhere in the town and he saw Surjit Singh inflicting a stab wound on the thigh and he left the place. (4) A recovery of watch at the instance of Gurcharan Singh from P.W.9 and identified by the father as one belonging to the deceased.(5) A recovery of dagger at the instance of Surjit Singh on which the blood stain found to be that of human origin."

The Supreme Court, in view of the above observation made in paragraph 7 quoted above, has relied on only circumstance of motive and recovery of watch, and circumstance of recovery of watch, by itself, as rightly held by the Supreme Court, cannot lead to an inference or a presumption of guilt for commission of murder of the deceased. In the instant case, (1) the accused wrongly represented to the husband of the deceased that he is sent by her father to fetch her; (2) since deceased was sent with the accused, from third day it was noticed that accused and deceased are missing.(3) After some days, P.W.2 found some bones of skeleton and a bag containing clothes. The bag and its contents being clothes were proved to be of deceased Chanda.(4) Ornaments on the person of the deceased were missing from the scene of offence. Almost all the ornaments are found. However, in our opinion, except find of two ornaments, evidence as to find of remaining ornaments cannot be taken support of, to support the order of conviction passed by the

learned Additional Sessions Judge. Two ornaments, namely, Articles 19 and 20, are proved to be of deceased and found from the house of the accused. Accused has not disputed these articles to be of the deceased and therefore in view of the observation in the case of Wasim Khan v. The State of Uttar Pradesh,reported in AIR 1956 SC 400,presumption arises that the accused is guilty of murder as well as of robbery. In the case of Wasim Khan (supra), it was established beyond doubt that the deceased travelled with his goods with the appellant (accused) on his bullock cart. He should have reached his destination in the course of the night. He never got there. Obviously, he was murdered on his way back home. Thereafter, the deceased was never seen alive by any one. In that case, it was also found that the accused-appellant was found in possession of the deceased's goods three days afterwords. The appellant made no effort to trace the whereabouts of the deceased or lodge information of his disappearance from the bullock cart. Here, in view of the circumstances stated above, which are not disputed, the only inference which can be drawn is that deceased was murdered by accused and deceased was also robbed by the accused. Case advanced by the accused is of a total denial.However, with regard to find of Articles 19 and 20, they are also suggested to have been produced by the mother of the accused, in the cross-examination of the Panch witness. Mother of the accused thereafter had not come forward to claim the same. Not only that, but identity and ownership of the said articles to be of the father and father-in-law of the deceased is not disputed nor challenged. Thus, this circumstance leads to draw inference that it is accused who has committed murder of Chanda and find of articles from his possession leads to the inference that she was also robbed.

Accused-appellant has also challenged the conviction under section 404 of the Indian Penal Code. In our opinion, in the light of the above discussion, accused has committed an offence of robbery, in view of the articles found at the instance of the accused, in particular Articles 19 and 20. Therefore, the accused cannot be said to have committed an offence under section 404 of the Indian Penal Code.

In view of the above discussion, the appeal filed by the appellant, namely,Criminal Appeal No.369/89, is partly allowed, so far as it relates to conviction under section 404 of the Indian Penal Code.

Appeal of the appellant-accused so far as conviction under section 302 of the Indian Penal Code is concerned, is liable to be dismissed and is dismissed.

The State has preferred an appeal against the order of acquittal of the appellant under Section 394 of the Indian Penal Penal Code. The learned Judge has on acquittal under section 394 convicted the accused under Section 404 of the Indian Penal Code. Section 404 of the Indian Penal Code reads as under:-

"404.Dishonest misappropriation of property possessed by deceased person at the time of his death,- Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease and has not since in the possession of any person legally entitled to such possession shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years."

On a bare reading of Section 404 of the IPC, it is clear that the same is not attracted in the facts established by the prosecution against the accused. However, in our opinion, the facts duly proved by the prosecution falls within the four corners of offence of theft which is aggravated form of robbery in Section 390 of the Indian Penal Code. Relevant portion of which reads as under:-

"390.Robbery,- In all robbery there is either theft or extortion.

When theft is robbery.-Theft is "robbery" if in order to the committing of the theft,or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.

Explanation.- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint".

In the instant case prosecution has proved that two of the articles, namely 19 and 20 proved to be of the deceased are found from the accused. The accused has no explanation for the same. The prosecution case is that accused is either a thief or has received stolen property. The accused has not explained satisfactorily in order to exonerate him from the charge of receiving stolen property .The only charge then remains is of theft again him. The manner and method alleged by the prosecution to prove the charge of murder against him if read together with find of articles, the same can be inferred to commission of an offence under Section 390 of the Indian Penal Code punishable under section 392 of the IPC. In view of this fact, appellant is liable to be convicted under Section 390 of the Indian Penal Code punishable under Section 392 of the Indian Penal Code. In view of this fact, appellant is liable to be convicted under Section 392 of the Indian Penal Code.

Criminal Appeal No.445/89 filed by the State against the order of acquittal of the accused under section 394 of the Indian Penal Code is, however, allowed. But the offence committed by the appellant-accused would be under section 392 of the Indian Penal Code and not under section 394 of the Indian Penal Code. The learned Additional Sessions Judge has awarded sentence of rigorous imprisonment for two years under section 404 of the Indian Penal Code. Under section 392 of the Indian Penal Code, the imprisonment is for the period which may extend to ten years and also fine, and if the offence is committed between sun-set and sun-rise, it may extend to fourteen years. There is nothing on record to show that the offence was committed between sun-set and sun-rise. Therefore, the second part of section 392 of the Indian Penal Code does not come into play. Only thing that remains of section 392 of the Indian Penal Code is imprisonment which may extend to ten years and fine.

As we propose to order the sentences to run concurrently with the substantive sentence under section 302 of the Indian Penal Code, we do not propose to call

the appellant-accused to hear him on the question of sentence. We, therefore, hold the appellant-accused guilty for the offence under section 392 of the Indian Penal Code and award him rigorous imprisonment for seven years only, for the said offence. Substantive sentences to run concurrently.

Order accordingly.

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